

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Apps Communications, Inc.	:	
-vs-	:	
Illinois Bell Telephone Company	:	
(AT&T Illinois)	:	06-0761
	:	
Complaint as to billing/charges in	:	
Naperville, Illinois.	:	

PROPOSED ORDER

By the Commission:

On November 28, 2006, Apps Communications, Inc., ("Apps" or "Complainant"), filed a verified Complaint with the Illinois Commerce Commission ("Commission") against Illinois Bell Telephone Company ("AT&T Illinois" or "Respondent") complaining of a violation of Section 5/9-252, 5/10-108 and 5/13-514(6) of the Public Utilities Act. Apps Communications, Inc. ("Apps") initially filed a Complaint against AT&T Illinois on November 28, 2006. Apps amended its Complaint on March 30, 2007, and again on June 5, 2007. AT&T Illinois filed a Motion to Dismiss on June 27, 2007. No response to the motion to dismiss was filed by the Complainant.

The Complaint consists of the pre-printed Formal Complaint cover sheet supplied by the Commission and various attachments, including 12 pages of numbered allegations and requests for relief, divided into two counts. The Complainant also attached 12 exhibits (labeled Exhibits A through L), consisting of contractual documents, correspondence between the parties and bills received by Apps.

Count I

Count I of the Complaint is titled "Fraud Regarding Verizon Contract" and arises from a Confirmation of Service Order ("CSO") entered into between AT&T Illinois and Apps for a DS1 circuit running between Naperville and Sandwich, Illinois. Complaint, Count I ¶ 4. A copy of this CSO, signed only by Apps, is Exhibit A to the Complaint. (A fully executed copy is attached as Appendix 1.) The CSO, which has a 60-month term, is titled "Special Access/FCC2 – Base Rate, Fractional DS1, DS1 and DS3 Services." Complaint Ex. A. The first narrative paragraph of the CSO states that Apps agreed to purchase the service "under a term plan according to prices, quantities, terms and conditions in the applicable SBC tariffs." *Id.* The "Tariffs" paragraph in the CSO also states:

[i]n the event of a conflict or discrepancy between provisions of this Order and provisions of the applicable tariff or catalog, the provisions of the tariff or catalog will prevail. The applicable tariffs are the complete agreement of the parties and supersede any discussions, representation, or proposals, written or oral, concerning the Service.

Id. Count I also specifically alleges that the DS1 service will be provided at the “FCC2 Rate.” Complaint, Count I ¶ 4.

Count I alleges that the DS1 line was installed in April 2005 (Complaint, Count I ¶ 10) and has “functioned without issue or problem.” Id. ¶ 11. Apps also alleges that it received bills for the DS1 service from AT&T Illinois but that, in August 2006, it also began receiving bills for the circuit from Verizon. Id. ¶¶ 12-13.

Apps alleged that it was unaware that AT&T Illinois could not provision the DS1 service by itself that it did not know that Verizon would also bill it for the service, and that it never entered into a contract with Verizon for the service. See id. ¶¶ 14, 19-23. Apps’ fundamental claim is that AT&T Illinois failed to disclose Verizon’s involvement in providing the DS1 line and thus it misled Apps into entering into the CSO. Id. ¶¶ 24-28. The remedy Apps seeks is for the Commission to order AT&T Illinois to comply with the rates in the CSO and to award Apps damages, including compensation for “loss of service to its customers, attorney’s fees, employee hours to correct a problem..., lowered credit rating, and loss of reputation.” Id. ¶ 30.

Count II

Count II of the Complaint is subtitled “Fraud Regarding DS1 Line Acct #HCGS.930548.LB” and arises from a CSO entered into between AT&T Illinois and Apps for a DS1 circuit running, at least initially, between Elmhurst and Bensenville, Illinois. Complaint, Count II ¶ 14. An unsigned, undated copy of this CSO is Exhibit I to the Complaint. This CSO also has a 60-month term and, except for the rate and service location information, is basically identical to the CSO at issue in Count I. Compare Complaint Ex. A and I. In particular, the CSO makes clear in at least two places that its terms are subject to the applicable AT&T tariffs. See Complaint Ex. I. In addition, like Count I, Count II specifically alleges that the service for the DS1 line will be provided at the “FCC2 Rate.” Complaint, Count II ¶ 14.

Count II also refers to a Letter of Subscription (“LOS”) through which Apps could order certain services, including DS1 lines, from AT&T. Id. ¶ 5 and Ex. H. As set forth in the LOS, the agreement described in the LOS was to be embodied in an FCC contract tariff. See Complaint Ex. G at 1-2. This contract tariff can be found in Ameritech Tariff FCC No. 2 at pages 22-643 through 22-648, and it provides lower rates for certain services than otherwise would be available to Apps. Complaint, Count II ¶ 12.

Count II alleges that the DS1 line was installed in December 2005 (Id. ¶ 17) and has “functioned without issue or problem.” Id. ¶ 18. Apps alleged that AT&T Illinois never

billed it correctly for the DS1 line and, in particular, billed it at regular retail rates, rather than the lower rates available under the contract tariff. Id. ¶¶ 19-20. Count II also alleges that an AT&T Illinois agent advised Apps that changing one of the end points of the line from Elmhurst to Apps' primary office in Orland Park would allow the line to be billed at the lower rates. Id. ¶ 21. Apps accordingly changed one end point to Orland Park, but the charges billed for the line did not decrease. Id. ¶¶ 22-23. Apps then asserted that AT&T Illinois could not legally increase the charges for the DS1 line under the CSO unless Apps moved one of the end points. Id. ¶ 26.

Apps' fundamental claim is that AT&T Illinois misled Apps into the belief that moving one of the end points of the DS1 line would make the lower rates from the contract tariff applicable, when the move actually caused Apps' billing to increase. Complaint, Count II ¶¶ 16, 25-28. The remedy Apps seeks for Count II is similar to what it seeks for Count I: namely, that the Commission order AT&T Illinois to comply with the rates in the CSO and award Apps damages, including compensation for "loss of service to its customers, attorney's fees, employee hours to correct a problem..., additional unnecessary charges to its account, lowered credit rating, and loss of reputation." Id. ¶ 17.

At the bottom of each count of the Complaint, Apps alleged common law fraud claims. In particular, the Complaint alleges that AT&T Illinois made representations to induce Apps to enter into a contract (Complaint, Count I ¶ 24) or to move the end point of a DS1 line. Id., Count II ¶ 25. The Complaint then alleges that AT&T Illinois knew that it could not provide service under the contract (id., Count I ¶ 25) or that it could not increase Apps' billing without the end-point move. Id., Count II ¶ 26. It also alleged that AT&T Illinois knew that Apps had no knowledge about the subject of AT&T Illinois' representations (id., Count I ¶ 26, Count II ¶ 27), and that AT&T Illinois knew that Apps would rely on the representations. Id., Count I ¶ 27, Count II ¶ 28. It further alleges that Apps relied on AT&T Illinois' statements (id., Count I ¶ 28, Count II ¶ 29) and that Apps suffered damage as a result of AT&T Illinois' conduct. Id., Count I ¶ 30, Count II 2nd ¶ 17.

AT&T Motion to Dismiss

AT&T filed a Motion to Dismiss this complaint. In its motion, AT&T argues that the Commission lacks the ability, for at least two reasons, to decide the issues raised by the Complaint. First, both counts of the Complaint involve services that AT&T Illinois provided to Apps pursuant to its federal tariff, which the Commission lacks the authority to interpret. Second, the Complaint fails to state a valid state-law claim within the Commission's jurisdiction. The Commission therefore should dismiss the Complaint.

I. The Commission Should Dismiss the Complaint Because It Only Raises Issues under the Federal Tariff.

Adjudication of both Count I and Count II would require the Commission to consider AT&T's federal tariff and evaluate whether the company has acted in compliance with the terms of that tariff. However, this Commission does not have

jurisdiction to resolve a dispute over the interpretation of the terms and conditions of an interstate access service, such as the DS1 lines at issue here, purchased out of an FCC tariff. The U.S. District Court in Chicago considered this issue when it evaluated a Commission decision that prohibited AT&T Illinois from assessing early termination charges on special access services provided pursuant to a federal tariff. Illinois Bell Telephone Co., Inc. v. Globalcom, Inc., 2003 WL 21031964 (N.D. Ill. May 6, 2003). The Court found that the Commission lacked jurisdiction to interpret the company's federal tariff, even though the special access circuits at issue involved jurisdictionally 'mixed' circuits that carried both interstate and intrastate traffic. The Commission's "jurisdiction over intrastate commerce does not grant the state commission jurisdiction to interpret a federal tariff. To the contrary, mixed-use special access lines that carry 10% or more of interstate traffic are assigned to the FCC's jurisdiction under federal tariffs." Id., 2003 WL 21031964, at *2. Accordingly, the Court ruled in favor of AT&T Illinois and invalidated the Commission's decision construing the federal tariff.

Both counts of Apps' complaint turn on the interpretation of provisions of the Ameritech (now AT&T) Tariff FCC No. 2. See Complaint, Count I ¶ 4, Count II ¶ 14, Ex. A and I. The conduct at issue in Count I – whether AT&T failed to reveal the involvement of another carrier in providing DS1 service (Complaint, Count I ¶¶ 23-28) – is expressly addressed in this federal tariff. Similarly, the federal tariff controls resolution of the issue in Count II – whether Apps should be billed pursuant to the generic DS1 rates in the federal tariff or the rates in the Apps-specific contract section of the tariff. Complaint ¶¶ 3, 12, 19-21. Although it may be possible for Apps to present claims arising from AT&T's federal tariff to the Federal Communications Commission, this Commission has no ability to consider them. As a result, it should dismiss Apps' complaint.

II. The Commission Should Dismiss the Complaint Because It Does Not Set Forth a State Law Claim Cognizable by the Commission.

The Complaint makes only a cursory attempt to raise state law claims within the Commission's jurisdiction. The Formal Complaint cover sheet refers to three provisions of the PUA – §§ 9-252, 10-108, and 13-514(6) – that supposedly are involved with the Complaint, but those sections are never again mentioned in the 11 pages of numbered allegations that follow. Those allegations instead attempt to set forth two claims of common-law fraud supposedly committed by AT&T Illinois when it contracted with Apps for the DS1 circuits.

These allegations are insufficient to give the Commission the authority to decide whether AT&T Illinois has wronged Apps in some legally cognizable way. None of the cited provisions of the PUA give the Commission jurisdiction over Apps' claims, and the Commission does not have jurisdiction over common-law claims.

A. Apps Cannot State a Claim Under the Three Cited PUA Provisions.

The cover sheet to Apps' Complaint refers to §§ 9-252, 10-108, and 13-514(6) of the PUA. It is unclear whether Apps is even trying to base a claim on these three sections, since they are mentioned only on the cover sheet and not in the Complaint's

substantive allegations. But even Apps intended to found its claims on these sections, it cannot properly do so.

- Section 9-252 gives the Commission authority to hear complaints that a utility has charged “an excessive or unjustly discriminatory amount” for its services. 220 ILCS 5/9-252. Another provision of the PUA makes clear, however, that § 9-252 is applicable only to non-competitive telecommunications services. See 220 ILCS 5/13-101. DS1 circuits, such as those ordered by Apps, are competitive services. Accordingly, under the restriction imposed by § 13-101, Apps cannot avail itself of any remedy provided by § 9-252.

- Section 13-514(6) prohibits a telecommunications carrier from acting unreasonably “in a manner that has a substantial adverse impact on the ability of another telecommunications carrier to provide service to its customers.” 220 ILCS 5/13-514(6). Section 13-515 provides the enforcement mechanism for violations of § 13-514 and, under § 13-515, a prerequisite to filing a complaint is providing the potential defendant with notice of the alleged violation and an opportunity to correct it. See 220 ILCS 5/13-515(c). Section 515 also requires, among other things, that the complaint include a statement that the 48-hour notice requirement has been fulfilled. See 220 ILCS 5/13-515(d)(2).

Apps’ complaint fails to meet this requirement, since the Complaint contains no allegation that Apps sent AT&T Illinois a 48-hour notice letter. Indeed, such an allegation would be impossible, since Apps never provided AT&T Illinois with a 48-hour notice letter about the billing issues that are the subject of the Complaint. A carrier’s failure to provide the required 48-hour notice of an alleged violation of § 13-514 is grounds for dismissal of any claim based on such a violation. See Administrative Law Judge’s Ruling, Globalcom, Inc. v. Illinois Bell Telephone Co., Docket No. 02-0365, at 12 (July 5, 2002). (A copy is attached as Appendix 8.) Because Apps failed to provide AT&T Illinois with a 48-hour notice of the supposed § 13-514(6) violations alleged in the Complaint, it cannot avail itself of the cause of action provided by that section.

- Section 10-108 gives the Commission authority to hear complaints involving “any act or thing done or omitted to be done in violation, or claimed to be in violation of any provision of [the PUA], or any order or rule of the Commission.” 220 ILCS 5/10-108. This provision does not, by itself, give the Commission jurisdiction over a complaint if that complaint does not identify another substantive provision of the PUA, or a Commission order or rule that has been violated. As explained above, Apps has not properly invoked either of the two other PUA sections cited on the cover sheet to the Complaint. Because Apps cannot present a claim under either of these substantive PUA provisions, § 10-108 standing alone cannot provide a basis for Commission jurisdiction. Since Apps presents no claim within the Commission’s jurisdiction, the Complaint should be dismissed.

B. The Commission Cannot Consider Apps' Fraud Claims.

An administrative agency, such as the Commission, "only has the authorization given to it by the legislature through the statutes." Business & Professional People for the Public Interest v. Illinois Commerce Comm'n, 136 Ill.2d 192, 243, 555 N.E.2d 693, 716 (1989). An agency has "no general or common law powers." Id. at 244, 555 N.E.2d at 717. As a result, the Commission has no authority to adjudicate common law claims. See Order, Zweifel v. Comcast Phone of Illinois, LLC, Docket No. 04-0627, at 3 (Sept. 28, 2005)(finding that common law breach of contract claim is beyond Commission jurisdiction) Order, Paniotte v. Illinois Bell Telephone Co., Docket No. 01-0393, at 4 (Sept. 11, 2002)(finding that common law defamation claim is beyond Commission authority) see also Sutherland v. Illinois Bell Telephone Co., 254 Ill. App. 3d 983, 991, 627 N.E.2d 145, 151 (1st Dist. 1993)(finding that suits seeking damages for tortious conduct should be filed in circuit court, rather than with Commission).

Although it may be possible for Apps to present its fraud claims to a court of competent jurisdiction, the Commission has no ability to consider them. As a result, the Commission should dismiss the Complaint.

Commission Analysis and Conclusions

After reviewing the pleadings and the motion to dismiss, the Commission concludes that the Complainant failed to state a cause of action in which relief can be granted under the Public Utility Act.

In Count II and III of the Complaint, Apps is asking the Commission to consider AT&T's federal tariff and evaluate whether the company has acted in compliance with the terms of that tariff. However, this Commission does not have jurisdiction to resolve a dispute over the interpretation of the terms and conditions of an interstate access service, such as the DS1 lines at issue here, purchased out of an FCC tariff.

This Commission derives its authority solely from the Public Utilities Act. (220 ILCS 5/1-101 et. seq.) Because the Commission is purely a statutory creation and possesses no inherent or common law authority, its jurisdiction is limited by the Act. The Commission's subject matter jurisdiction gives us the power to hear and determine a particular class of cases and the authority to grant the relief requested.

Therefore, the Motion to Dismiss filed by Illinois Bell Telephone (AT&T Illinois) is granted, and this complaint is dismissed with prejudice.

A copy of the Administrative Law Judge's Proposed Order was duly served on Parties.

Based on the foregoing, the Complaint should be dismissed with prejudice for failing to state a cause of action under the Public Utility Act.

The Commission, having reviewed the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) Illinois Bell Telephone Company (AT&T Illinois) is a Public Utility within the meaning of Section 13-202 of the Public Utilities Act;
- (2) the Commission has jurisdiction over the Respondent herein;
- (3) the recitals of fact in the prefatory portion of this Order are supported by the record and hereby adopted as findings of fact;
- (4) Respondent's Motion to Dismiss may properly be granted and the Complaint is properly dismissed with prejudice.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission, that the Complaint filed by Apps Communications, Inc. against Illinois Bell Telephone Company (AT& T Illinois) on November 28, 2006, is dismissed with prejudice.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Admin. Code Section 200-880, this Order is final; it is not subject to the Administrative Review Law.

DATED:
BRIEFS ON EXCEPTIONS DUE:
REPLIES ON EXCEPTION DUE:

November 9, 2009
November 23, 2009
November 30, 2009

Glennon P. Dolan
Administrative Law Judge